No. 76-682

In the Supreme Court of the United States

OCTOBER TERM, 1977

SANTA CLARA PUEBLO, ET AL., PETITIONERS

v.

JULIA MARTINEZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States occupies a unique and important position with respect to the Indian tribes within its borders and the members of those tribes. As this Court has long recognized, the United States has primary responsibility for the protection of the Indian tribes, United States Constitution, Art. I, Sec. 8, cl. 3, and has assumed a relationship towards them similar to that of a guardian. See *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375. Thus, any question concerning the powers or obligations of Indian tribes, or the

rights of individual Indians with respect to those tribes, is of substantial concern to the United States. Moreover, the Civil Rights Division of the Department of Justice has principal responsibility for enforcement of the Indian Civil Rights Act. 28 C.F.R. 0.50(a).

The Court invited expression of the views of the United States in this case when the petition for a writ of certiorari was pending. In its memorandum the United States stressed the importance of both the jurisdictional and substantive issues and recommended that the petition be granted (p. 9). We said that if the petition were granted, "the United States will file an *amicus curiae* brief addressing these questions on the merits" (*ibid.*). We now do so.

STATUTES INVOLVED

Sections 1301–1303 of Title 25 of the United States Code, the Indian Civil Rights Act of 1968, Title II, 82 Stat. 77–78, provide as follows:

§ 1301. Definitions

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies,

and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses

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in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

STATEMENT

1. Respondents filed this class action for declaratory and injunctive relief in the United States District Court for the District of New Mexico, challenging on equal protection grounds under the Indian Civil Rights Act (25 U.S.C. 1302(8)) an ordinance of the Santa Clara Pueblo that denies tribal membership to the children of Pueblo women, but not of Pueblo men, who marry outside the tribe. Respondent

Julia Martinez, a member of the Pueblo, is married to Myles Martinez, a full-blooded Navajo Indian who is not a Pueblo member (Pet. App. 13a).[1] They have lived on the Pueblo since their marriage in 1941 (*id.* at 17a, 30a–31a). Respondent Audrey Martinez is one of their eight children (*id.* at 13a), who has lived on the Pueblo all her life except for a brief absence for schooling (*id.* at 17a).

Petitioner Santa Clara Pueblo is an Indian tribe that has organized and adopted a constitution and by-laws pursuant to the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476 (*id.* at 15a).[2] The tribe occupies a reservation of 48,000 acres near Sante Fe, New Mexico, on which approximately 1,200 members and 150 to 200 non-members reside (*id.* at 14a). About 150 members reside elsewhere, one-third of them at other locations in New Mexico and the rest scattered through twenty-two other states (*ibid.*).

Petitioner Lucario Padilla is the Governor of the Pueblo. He is the executive head of the Pueblo's government and is responsible for enforcing its laws (*id.* at 13a; A. 5). He is also a member of the Pueblo Council, in which legislative and judicial authority is vested (Pet. App. 15a; A. 3–5). Other members of the Council include the Lieutenant Governor, the Secretary, the Treasurer, the Interpreter, the Sheriff, and eight representatives (Pet. App. 15a; A. 8–10).

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[1] "Pet. App." refers to the Appendix to the petition for a writ of certiorari.

[2] The Pueblo's constitution and by-laws appear in the Appendix filed in this Court (hereinafter "A".), at 1–15.

Under the Pueblo constitution, adopted in 1935 (Pet. App. 15a), the Council has authority to determine which children of marriages between members and non-members will be recognized as Pueblo members (Pet. App. 16a).[3] Before 1939 relatively few Pueblo members married outside the tribe, and the Council considered the membership status of each child of a mixed marriage individually (*id.* at 21a). In several instances the Council granted membership to children of mixed marriages in which the wife was the Santa Claran (*id.* at 30a, 44a). In the late 1930s, however, the number of Pueblo members who married outside the tribe markedly increased. Concern grew that the resulting increase in the population of the Pueblo would strain its limited economic resources (*id.* at 20a), and to alleviate this strain the Council on December 15, 1939, passed the following ordinance (Pet. App. 16a, 29a–30a; A. 18):

> Be it ordained by the Council of the Pueblo of Santa Clara, New Mexico, in regular meeting duly assembled, that hereafter the following rules shall govern the admission to membership to the Santa Clara Pueblo:
>
> 1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo.
>
> 2. All children born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo.
>
> 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo.
>
> 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.[4]

The record indicates that the ordinance has been applied uniformly to deny membership to children, like the Martinez children, of marriages between women Pueblo members and non-members of the Pueblo (Pet. App. 9a, 18a).

Pueblo members possess certain rights not afforded non-members. They have the right to vote in tribal elections, the right to hold tribal office, and certain land use rights, including the right to pass use of land to succeeding generations (Pet. App. 17a).[5] Non-members such as the Martinez children, while denied these rights, are allowed to participate in the Pueblo's religious activities and are eligible to receive federal benefits afforded to Indians generally (*id.* at 18a).

The Martinez children live on the tribe's reservation, speak its language (Tewa), and participate in its

[3] The authority evidently derives from the legislative powers granted to the Council by Article IV, Section 1, of the constitution (A. 3–4) and from Article II, Section 1(c), which provides (A. 2) that the membership of the Pueblo shall include: "All children of mixed marriages between members of the Santa Clara pueblo and non-members, provided such children have been recognized and adopted by the council."

[4] Respondents attack parts 2 and 3 of the ordinance (Pet. App. 13a).

[5] Pursuant to an Act of Congress in 1858, the Pueblo holds all of the land within its boundaries in fee simple. Members have possessory interests in tracts of land which they may pass on to their descendants (*id.* at 31a n. 3).

religious ceremonies (*id.* at 25a–26a, 30a–31a). Since 1946 respondent Julia Martinez has sought unsuccessfully to have them enrolled as members of the Pueblo. After exhausting all available remedies within the Pueblo (*id.* at 10a–11a), she and her daughter filed this action, claiming that the ordinance violated the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. 1302(8).

2. The district court upheld the ordinance. Rejecting petitioners' contention that it lacked jurisdiction over the action, the court held (Pet. App. 1a–11a) that 25 U.S.C. 1302(8) and 28 U.S.C. 1343(4) conferred jurisdiction over cases challenging tribal membership determinations on equal protection grounds (*id.* at 2a–8a); that the case presented a justiciable controversy (*id.* at 8a–9a); and that respondents had exhausted all tribal remedies (*id.* at 10a–11a). On the merits, the court stated that "the equal protection guarantee of the Indian Civil Rights Act is not identical to the constitutional guarantee of equal protection" (*id.* at 23a) and "should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions" (*id.* at 25a). Although the court acknowledged that before 1939 the membership status of the children of mixed marriages was determined on a case-by-case basis (*id.* at 21a), it concluded that in view of the "traditionally patrilineal and patrilocal" nature of Pueblo society, the membership ordinance was sufficiently "rooted in certain traditional values" (*ibid.*).

3. The court of appeals reversed. Agreeing that the district court had jurisdiction over the claim and that sovereign immunity did not bar relief (*id.* at 32a–33a), the court ruled that while Fourteenth Amendment equal protection standards "do not * * * apply with full force," they do "serve as a persuasive guide" to construction of the equal protection clause of the Indian Civil Rights Act (*id.* at 42a–43a). Although the court suggested that the Pueblo's interest in "tribal, cultural and ethnic survival" might under some circumstances justify a discrimination that would be impermissible under the Fourteenth Amendment (*id.* at 43a), it found that, contrary to the conclusion of the district court, the membership ordinance was "the product of economics and pragmatics" and "historically * * * cannot be said to represent the Santa Clara tradition" (*id.* at 44a).[6] The court concluded that "[i]f the equal protection clause of the [Indian Civil Rights Act] is to have any consequence, it must operate to ban invidious discrimination of the kind present in this case" (*id.* at 44a).

[6] The court observed (*id.* at 45a):

"The instant tribe policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition. Also, inasmuch as it originates from practical economic considerations, it becomes an arbitrary and expedient solution to the problem which was then confronting the Tribe."

INTRODUCTION AND SUMMARY OF ARGUMENT

The provisions of the United States Constitution protecting individual rights against actions of the Federal and State governments have been considered not to apply to the actions of Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland,* 342 F. 2d 369 (C.A. 9). As Indian tribes increasingly asserted powers of self-government that were reaffirmed in the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461 *et seq.,* Congress deemed it advisable to impose certain limitations on their authority through the Indian Civil Rights Act of 1968, Title II, 82 Stat. 77–78; now codified as 25 U.S.C. 1301–1303. That Act enumerates certain specific rights that tribal governments may not abridge, and authorizes *habeas corpus* actions in federal court "to test the legality of * * * detention by order of an Indian tribe" (25 U.S.C. 1303).[7] Section 1302(8) of the Act provides that "[n]o Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

At issue here is an ordinance of the Santa Clara Pueblo denying tribal membership to children of

[7] Of the Act's ten provisions setting forth specific rights (25 U.S.C. 1302(1)–(10)), six may be described as primarily concerned with criminal procedure.

Pueblo women, but not of Pueblo men, who marry nonmembers of the tribe. We believe that the equal protection clause of the Indian Civil Rights Act allows tribes to make legislative distinctions that would be impermissible under the Fourteenth Amendment, if these distinctions can be justified by the need to preserve important and legitimate tribal interests. But we do not believe that the record in this case justifies, under the equal protection standards that we think should govern interpretation of the Act, the discrimination practiced on respondents. Moreover, we believe that respondents may seek declaratory and injunctive relief against that discrimination in federal court. We submit, therefore, that the judgment of the court of appeals should be affirmed.

I.

The threshold question is whether federal district courts have jurisdiction to grant declaratory and injunctive relief in cases arising under the Indian Civil Rights Act. Under 28 U.S.C. 1343(4), the district courts "have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." While the Indian Civil Rights Act does not expressly authorize the filing of civil actions to effectuate its terms, its prohibitions against specified tribal actions create clearly defined federal rights and imply the availability of judicial relief necessary

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to protect those rights. Habeas corpus actions under Section 203 of the Act, 25 U.S.C. 1303, while providing an effective remedy against deprivation of rights in most criminal cases, cannot provide adequate redress for loss of rights in noncustodial situations. A private right of action for declaratory and injunctive relief is therefore a necessary complement.

This Court has recognized implied rights of action under analogous civil rights statutes (*e.g.*, 42 U.S.C. 1973c, 42 U.S.C. 1981, and 42 U.S.C. 1982), as well as in other contexts where such judicial enforcement is necessary to carry out the congressional purpose. *Allen* v. *State Board of Elections*, 393 U.S. 544; *Johnson* v. *Railway Express Agency*, 421 U.S. 454; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409. "The fact that [a statute] is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 414, n. 13.

We recognize that Indian tribes enjoy sovereign immunity from suit unless that immunity has been expressly waived. *Puyallup Tribe, Inc.* v. *Department of Game of Washington*, No. 76–423, decided June 23, 1977, slip op. 7; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. Although the explicit prohibitions imposed on tribal authority by the Indian Civil Rights Act may be sufficient to override tribal immunity, at least for purposes of declaratory and injunctive relief, we believe that in any event respondents can seek such relief against the Governor

of the Pueblo, also named as a defendant. Tribal officials are not shielded by tribal immunity when they seek to enforce tribal laws that conflict with the superior authority of federal law. See *Ex parte Young*, 209 U.S. 123. Nor are tribal membership decisions any longer exempt from scrutiny after passage of the Indian Civil Rights Act, which applies to "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed * * *." 25 U.S.C. 1301(2).

II.

The Indian Civil Rights Act, while imposing certain non-Indian values on Indian tribes, nonetheless contemplates their continued existence as "unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557). It is not necessarily true, therefore, that classifications forbidden in non-Indian society must be struck down in the context of tribal society. Peculiarly Indian interests may justify such classifications where non-Indian interests could not. Indian interests must always be regarded as a relevant factor in assessing tribal legislation under the equal protection clause of the Act.

In the present case, however, we find no tribal interests sufficient to justify the discrimination embodied in the 1939 ordinance. Although petitioners claim the discrimination is necessary for the preservation of Pueblo culture, the ordinance is not substan-

tially related to the achievement of that important objective. It excludes from membership persons like the Martinez children who are culturally Santa Clarans and live at the Pueblo, while affording membership to persons who may have no ties with the Pueblo culture and live far away from the Pueblo. Nor can the ordinance be explained as the embodiment of a long-standing Pueblo custom or tradition; rather, it was enacted to solve an economic problem facing the Pueblo in 1939. Because other solutions are available that do not involve such invidious discrimination, the ordinance cannot stand.

ARGUMENT

I.

FEDERAL COURTS HAVE JURISDICTION TO GRANT DECLARATORY AND INJUNCTIVE RELIEF AGAINST OFFICIALS OF INDIAN TRIBES UNDER THE INDIAN CIVIL RIGHTS ACT

A. An important threshold question is whether the federal district courts have jurisdiction to give declaratory and injunctive relief[8] in a suit brought pursuant to the Indian Civil Rights Act. Under 28 U.S.C. 1343(4), the district courts have "original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As the Indian Civil Rights Act

[8] Respondents did not seek damages, and the question whether the Act authorizes suits for damages against tribes and tribal officials is not presented in this case.

plainly is an "Act of Congress providing for the protection of civil rights," the pertinent inquiry is whether the Act authorizes civil actions for such relief.

The Indian Civil Rights Act does not expressly grant or deny authorization for private persons to seek declaratory or injunctive relief for violations of the Act. The Act does provide, however, that "[n]o Indian tribe in exercising powers of self-government shall" deny certain enumerated rights, including the right to equal protection of its laws. 25 U.S.C. 1302. The phrase "powers of self-government" is broadly defined to include "all governmental powers possessed by an Indian tribe." 25 U.S.C. 1301(2). The Act was expansive in concept and execution, designed "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."[9]

Despite the Act's broad language and purpose, it expressly provides federal jurisdiction only for *habeas corpus* actions (25 U.S.C. 1303), a remedy that petitioners regard (Br. 16) as exclusive. Were this so, however, the guarantees of the Indian Civil Rights Act would have meaning only for persons in the custody of an Indian tribe. Because numerous important rights guaranteed by the Act (including freedom of religion, freedom of speech, and just compensation for the taking of property) can seldom be protected in a *habeas corpus* action, the only remedy, absent a

[9] S. Rep. No. 841, 90th Cong., 1st Sess. 6 (1967). The legislative history of the Act is set forth in detail in Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557 (1972).

federal right of action, would be to seek relief from tribal officials themselves, very possibly the same officials against whom the complaint would lie. We do not believe that Congress intended such an awkward and ineffective result. A civil right of action for declaratory and injunctive relief, after remedies within the tribe have been exhausted, provides a necessary complement to the right of *habeas corpus* specified in 25 U.S.C. 1303.[10]

This Court has frequently held that federal statutes passed to protect classes of citizens, although not expressly authorizing members of the protected class to institute suits, nevertheless implied a private right of action. In *Jones* v. *Alfred H. Mayer Co., supra,* the Court recognized a private right of action for equitable relief under 42 U.S.C. 1982,[11] stating: "[T]he fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy." 392 U.S. at 414, n. 13. Similarly in *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459–460, the Court found a private right of action for both equitable and legal relief to be implied in 42 U.S.C.

[10] See Note, *The Indian Bill of Rights and The Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1371–1372 (1969).

[11] 42 U.S.C. 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

1981.[12] In *Allen* v. *State Board of Elections,* 393 U.S. 544, the Court held that a private party could seek a declaratory judgment that a new state enactment was governed by Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, and that such a party, after proving that a State had failed to submit a covered enactment for Section 5 approval, could obtain an injunction against further enforcement of the enactment until it was submitted pursuant to Section 5.[13] The Court stated that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557 (footnote omitted). In *J. I. Case Co.* v. *Borak,* 377 U.S. 426, the Court recognized a cause of action under Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, as amended 15 U.S.C. 78n(a),[14] saying

[12] 42 U.S.C. 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[13] Section 5 provides that "no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, Section 5]."

[14] Section 14(a) provides that it shall be "unlawful for any person * * * [to violate] such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432. See also *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388; *Chicago & N.W. R. Co.* v. *Transportation Union,* 402 U.S. 570; *Wyandotte Co.* v. *United States,* 389 U.S. 191; *Texas & N.O. R. Co.* v. *Ry. Clerks,* 281 U.S. 548.

Recently in *Cort* v. *Ash,* 422 U.S. 66, the Court identified four factors as "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one," and all those factors support recognition of a cause of action here. First, a plaintiff must establish that he is " 'one of the class for whose *especial* benefit the statute was enacted * * *.' " 422 U.S. at 78 (emphasis in original). As full-blooded American Indians who have lived on the Pueblo reservation virtually all their lives, respondents are members of the class intended to be protected by the Indian Civil Rights Act. Second, regard must be given to "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one" (*ibid.*). While there is no explicit indication here of congressional intent either to create or deny a private remedy, the intention to provide one seems implicit in the statute's language and its pur-

[15] The *Cort* analysis was reaffirmed by the Court in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37–41.

pose. See pp. 15–16, *supra.* Third, the Court must decide whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." 422 U.S. at 78. As we have indicated (pp. 15–16, *supra*), implying a private cause of action for declaratory and injunctive relief for violations of the Indian Civil Rights Act is not only consistent with the purpose of the Act, but necessary to effectuate that purpose. Fourth, the Court must ascertain whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law" (422 U.S. at 78). Where Indian matters are concerned, Congress has plenary power over the tribal relations of Indians, see, *e.g., Choate* v. *Trapp,* 224 U.S. 665, 671; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565, and the States, absent congressional authorization, have no jurisdiction over civil disputes arising on reservations between Indian tribes and their members. Cf. *Williams* v. *Lee,* 358 U.S. 217. Thus there is no remedy under state law to which respondents could be relegated.[16]

To support their argument that Congress intended to limit federal jurisdiction to the *habeas corpus*

[16] It might be argued, of course, that the correct inquiry in this context is whether "the cause of action [is] one traditionally relegated" to *tribal* law. Although Indian rights may traditionally have been enforced through tribal courts, Congress was concerned about the adequacy of the rights that Indians historically had enjoyed, and the Indian Civil Rights Act was therefore drafted to provide federal rights, which are commonly the concern of the federal courts.

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proceedings authorized by Section 1303, petitioners rely on inferences drawn from the legislative history. They point out (Br. 17–18) that Congress adopted Section 1303 after rejecting a proposal to provide a trial *de novo* in federal district court for all convicted defendants in tribal courts who alleged that their constitutional rights had been violated. See S. 962, 89th Cong., 1st Sess., introduced February 2, 1965. But the choice of one or another method of review for constitutional attacks on criminal convictions has little to do with whether a private right of action may also exist for declaratory and injunctive relief of a civil nature. While *habeas corpus* may be the exclusive means of redress in the areas to which it applies, it does not foreclose other causes of action that are necessary to protect rights outside its sweep.

Petitioners also rely on the following post-Act remarks by Senator Ervin (Br. 18):

> This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. The only provision in this bill that provides for Federal court interference is writ of habeas corpus, and that probably exists as law now * * *.[17]

[17] Hearing on Title II of the Civil Rights Act of 1968 (Amendments to the Indian Bill of Rights) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 15 (1969). After the Act was passed, further hearings were held to consider possible amendments to, and exemptions from, the Act.

While these remarks could be read to suggest a congressional intent to deny a private remedy, we believe that they merely address the means by which direct federal review of tribal criminal proceedings may be had. The "provision for Federal review" of criminal cases by *de novo* trial had been part of the original bill but was later eliminated in favor of the *habeas corpus* remedy. As noted above, that decision indicates no congressional intention to bar all other suits as well.[18]

We therefore believe that the district court had jurisdiction to consider respondents' claims for relief under the Indian Civil Rights Act.[19] There remains the question, however, of the tribe's sovereign immunity.

B. Indian tribes, as quasi-sovereigns, enjoy a traditional immunity from suits without consent. *Puyallup Tribe, Inc.* v. *Department of Game of Washington,*

[18] At the direction of Congress (see 25 U.S.C. 1311; S. Rep. No. 841, *supra* n. 9, at 6), the Secretary of the Interior has published a proposed model code for courts of Indian offenses. See 40 Fed. Reg. 16689. The proposed code deals only with criminal procedures and would apply only in "Courts of Indian offenses" (those established by the Secretary); it would have no binding effect in "tribal courts" (those established by the tribes). Because of its limited application and unenforceability, Congress could not reasonably have intended the model code to be the exclusive means—other than the writ of *habeas corpus*—for guaranteeing constitutional rights for the American Indian.

[19] In addition to the court of appeals in this case, the other courts of appeals that have considered the question have also held that such jurisdiction exists. *E.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231 (C.A. 4); *Laramie* v. *Nicholson*, 487 F. 2d 315 (C.A. 9), certiorari denied *sub nom. Tonasket* v. *Thompson*, 419 U.S. 871; *White Eagle* v. *One Feather*, 478 F. 2d

No. 76-423, decided June 23, 1977, slip op. 7; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C.C.A. 8). While that immunity can be waived by Congress, the waiver must be explicit. *United States* v. *United States Fidelity & Guaranty Co., supra.*

Although the prohibitions imposed on tribal authority by the Indian Civil Rights Act may be a sufficiently clear waiver of the tribes' immunity, at least insofar as suits for declaratory and equitable relief are necessary to achieve the purposes of the Act,[20] we think it unnecessary to reach that question in this case. Respondents' complaint named as a defendant not only the Pueblo itself but also the Governor of the Pueblo.[21] Even if the Pueblo is immune from suit, respondents may be entitled to an injunction against the Governor prohibiting him from enforcement of an ordinance that violates federal law.

This Court has long held that similar relief is avail-

1311 (C.A. 8). District courts have reached conflicting results. Compare, *e.g.*, *Seneca Constitutional Rights Organization* v. *George*, 348 F. Supp. 48 (W.D. N.Y.), with *Yellow Bird* v. *Oglala Sioux Tribe of South Dakota*, 380 F. Supp. 438 (D. S.D.).

[20] The decisions upholding district court jurisdiction of claims brought under the Indian Civil Rights Act, see n. 19, *supra*, have also held, either by implication or expressly, that the Act abrogates a tribe's sovereign immunity for the purposes of suit under the Act.

[21] By Santa Claran law, the Governor is charged with enforcing the laws of the Pueblo (Pet. App. 2a–3a, 13a).

able against state administrative officials. *Ex parte Young*, 209 U.S. 123. In that case, the Court held that the Eleventh Amendment did not bar a federal suit to enjoin a state attorney general from acting to enforce an unconstitutional state statute, explaining:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. [209 U.S. at 159–160.]

See also *Edelman* v. *Jordan*, 415 U.S. 651, 664. Likewise, tribal officials enforcing laws in conflict with federal law forfeit their official character and the shield of tribal immunity from suit.[22] If the Pueblo ordinance violates the statutory equal protection

[22] Although the court in *Thebo* v. *Choctaw Tribe of Indians*, *supra*, extended immunity to tribal officials, that suit was in essence an attempt to obtain attorneys' fees from the tribal treasury and thus equivalent to a suit against the tribe itself. *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459; *Edelman* v. *Jordan*, *supra*, 415 U.S. at 664. Respondents here seek no relief requiring disbursement of tribal funds.

clause, therefore, its Governor may not enforce that ordinance without becoming subject to suit."[23]

Petitioners also contend (Br. 12–15) that the Act, whatever its scope may otherwise be, does not authorize federal courts to exercise jurisdiction over suits challenging tribal membership determinations. It is true, as petitioners point out (*id.* at 15), that "[t]he courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership." Cohen, *Handbook of Federal Indian Law* 133 (1942). See also *Roff* v. *Burney*, 168 U.S. 218, 222. But the language of the Act plainly encompasses tribal membership determinations. As indicated, the Act applies to "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed * * *." 25 U.S.C. 1301(2). Nothing in the Act's legislative history evinces a congressional intent to exempt membership decisions from the scope of the Act. To the contrary, the legislators cited as an

[23] Although the Governor is responsible for enforcing Pueblo law, the tribe's constitution vests the authority for determining the membership status of the children of mixed marriages in the Pueblo Council. Respondents seek only to enjoin enforcement of the 1939 ordinance; they have not asked the court to order the Pueblo to accept anyone as members. In these circumstances, naming the Pueblo Governor as a defendant would appear to be sufficient. Should the Court, however, deem the joinder of the Pueblo Council necessary for just adjudication of this case, it may wish to order the Council added as a party pursuant to Rule 21, Fed. R. Civ. P. *Mullaney* v. *Anderson*, 342 U.S. 415.

example of a denial of rights by a tribal government a case in which tribal membership rights were revoked without compliance with due process."[24]

We conclude, therefore, that the district court had jurisdiction of this case.

II.

THE 1939 ORDINANCE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE INDIAN CIVIL RIGHTS ACT

The court of appeals, in appraising the challenged Pueblo ordinance under the equal protection clause of the Civil Rights Act, said it was "conceded" that the ordinance would be invalid if "measured by the Fourteenth Amendment alone" (Pet. App. 42a), but acknowledged that "Fourteenth Amendment standards do not * * * apply with full force" (*ibid.*). The court said that "[t]he interest of the Tribe in maintaining its integrity and in retaining its tribal cultures is entitled to due consideration," and that "where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be * * * reluctant to order the tribal authority to give way" (*ibid.*). But here, the court found, the tribe's asserted interest in "tribal, cultural and

[24] *Martinez* v. *Southern Ute Tribe of Southern Ute Res.*, 249 F. 2d 915 (C.A. 10), certiorari denied, 356 U.S. 960, cited in S. Rep. No. 841, *supra* n. 9, at 10, and in Hearings on H.R. 15419 and Related Bills (Indians: Rights of Members of Indian Tribes) before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. 17 (1968).

ethnic survival" (*id.* at 43a) did not justify the ordinance, because "there could have been a solution [to the mixed-marriage problem] without discrimination" (*id.* at 44a) and because the discrimination embodied in the ordinance was a policy "of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition" (*id.* at 45a). Describing the individual Indian's interest in tribal membership as "of great importance" (*id.* at 44a), the court held the ordinance invalid on the ground, evidently, that the sex discrimination it employed was not necessary, or substantially related, to the admittedly important objective of preserving the tribe's cultural and ethnic identity.

Other courts of appeals have taken a similar approach. They have generally agreed that the interest in preserving tribal culture and self-government justifies deviation from the equal protection standards of the Fourteenth Amendment, though they have not agreed on a single test by which to weigh that interest. See, *e.g.*, *White Eagle* v. *One Feather*, 478 F. 2d 1311, 1314 (C.A. 8); *Howlett* v. *Salish and Kootenai Tribes*, 529 F. 2d 233, 238 (C.A. 9). The Eighth Circuit in *Means* v. *Wilson*, 522 F. 2d 833, 842, framed the pertinent inquiry as whether the challenged action was "founded in tribal custom or governmental purpose which would justify modification of traditional equal protection concepts," while the Ninth Circuit in *Howlett* v. *Salish and Kootenai Tribes*, *supra*, 529 F. 2d at 238, asked whether "strict application of traditional equal protection doctrines would signifi-

cantly impair a tribal practice or alter a custom firmly embedded in Indian culture." At least one court of appeals, however, has taken a more deferential view of tribal law under the Act, apparently requiring only that it be applied equally, and with procedural due process, to persons similarly situated. *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1236–1337 (C.A. 4).[23]

We agree with the court below that the equal protection clause of the Indian Civil Rights Act, while derived from the constitutional clause and bearing many of its values, requires a different and special judicial treatment, an interpretation that respects the need to preserve tribal culture, tradition, self-government, and ethnic identity. Where a tribal law or action

[23] We are aware of only one appellate decision, *Daly* v. *United States*, 483 F. 2d 700 (C.A. 8), in which a classification that arguably violated Fourteenth Amendment standards was appraised by the court and said not to violate the equal protection clause of the Indian Civil Rights Act. In *Daly*, the district court ordered the reapportionment of elective districts for tribal elections in accordance with the one-person, one-vote principle. The court also ordered the elimination from its remedial plan of a requirement based on a provision of the tribe's constitution that specified that at least one-half of the councilmen from each district had to be of at least one-half Indian blood. The court of appeals said that this constitutional provision did not violate 25 U.S.C. 1302(8), because "this is one of those 'respects [in which] the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights.'" 483 F. 2d at 705. This was *dictum*, however, because the court of appeals declined to overturn the lower court's elimination of the classification from the election plan. The court explained that the blood quantum requirement did not fit the remedial plan, which included two single-member districts. 483 F. 2d at 706.

that would violate Fourteenth Amendment standards does significant injury to the interests of individuals, however, the asserted tribal interests must be appraised to determine whether they justify the discrimination. In the present case, we think the court of appeals correctly concluded that the discrimination against female tribe members and their children embodied in the Pueblo ordinance cannot be justified on the record here by any substantial, or even rational, relationship to the interest in preserving tribal culture and tradition.

A. Under the equal protection clause of the Fourteenth Amendment, legislative enactments that discriminate between individuals or classes are not invalidated *per se,* but are assessed in terms of the basis and need for the distinction and the individual interests affected by it. Legislative classifications that do not affect fundamental rights are normally upheld as long as they do not make distinctions deemed unusually suspect or sensitive and as long as they bear a rational relationship to a permissible legislative goal. If the objectives of an enactment are legitimate state purposes, "[t]he Equal Protection Clause requires only that the distinction drawn * * * rationally promote the regulation's objectives." *County Board of Arlington County, Virginia* v. *Richards,* No. 76–1418, decided October 11, 1977, slip op. 3. Such deference has not been accorded, however, when the distinction drawn by the legislature creates a suspect classification—one based on race, alienage, or illegitimacy, for example—or impinges on fundamental, constitutionally protected rights. See *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40. Thus, before a discrimination based on alienage is permitted to stand, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 605; *Nyquist* v. *Mauclet* No. 76–208, decided June 13, 1977.

In relatively recent years, legislative distinctions based on gender have come under progressively more critical judicial examination. With respect to the role of women in society, the courts are now discarding, and requiring legislatures to discard, "the role-typing society has long imposed." *Stanton* v. *Stanton,* 421 U.S. 7, 15. The result has been invalidation of statutes based on "old notions," *id.* at 14, on "archaic and overbroad generalizations," see *Schlesinger* v. *Ballard,* 419 U.S. 498, 508, and on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig* v. *Boren,* 429 U.S. 190, 198–199. Legislatures today, instead of relying on these discredited assumptions, have been required to "choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Id.* at 199.

To be upheld under present Fourteenth Amendment standards, classifications on the basis of sex "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren, supra,* 429 U.S. at 197. Discriminations that merely serve "administrative ease and convenience," or that employ "gender as an inaccurate proxy for other, more germane bases of classification," *id.* at 198, are no longer to be tolerated.

We have no doubt that the Pueblo ordinance at issue here would fail to survive scrutiny under the Fourteenth Amendment standard set forth in *Craig* v. *Boren, supra* (see the discussion at pp. 37–42, *infra*). But in interpreting and applying the equal protection clause of the Indian Civil Rights Act, we must make further inquiries. We must consider whether Congress intended the Act to impose on Indian communities the same standards and the same results that flow from equal protection analysis under the Fourteenth Amendment, or whether certain peculiarly Indian interests may justify discriminations under the Act that state interests in non-Indian society could not justify under the Constitution.

B. The guarantees of the United States Constitution that protect individual rights against actions of the Federal and State governments have been considered not to regulate the exercise of governmental authority by Indian tribes. *Talton* v. *Mayes,* 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F. 2d 553 (C.A.

8.) But see *Colliflower* v. *Garland,* 342 F. 2d 369 (C.A. 9). In the Indian Civil Rights Act, Congress has acted to provide such protection for the individual rights of Indians. Among the guarantees of the Act is the provision (25 U.S.C. 1302(8)) that "[n]o Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws * * *."

The equal protection clause of the Act follows almost verbatim the language of the Fourteenth Amendment, the only change being substitution of "equal protection of its laws" for "equal protection of the laws." Some *amici curiae* ascribe great significance to this change (*e.g.*, Brief of the National Tribal Chairmen's Association 15–29), finding in it a congressional intent to require only equal application of the tribal laws, not equal protection in the content of those laws as well. We believe the absence of supporting legislative history to be strong evidence that no such novel construction was intended.[20] It makes little sense to suppose that Congress, in its effort to provide greater protection for individual rights, would tacitly endorse the passage of discriminatory laws so long as no individual exceptions were made to those laws. If Congress had contemplated such a departure from established equal protection principles, it could have been expected to indicate this intent in the statute, or to provide some evidence in the legislative history, or at least to refrain from

[20] A 1966 summary report of a Senate subcommittee does contain a statement that the equal protection clause in a substitute bill

misleadingly tracking the language of the traditionally freighted constitutional clause.[27]

While the legislative history of the Act reflects no intent to jettison basic understandings of equal protection, it does show congressional concern for the preservation of traditional Indian culture.[28] To be sure, the Act was designed to impose certain contemporary non-Indian values on Indian tribes, largely

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offered by the Department of the Interior was "in some respects" narrower than the equal protection clause of the Fourteenth Amendment. Constitutional Rights of the American Indian, Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Pursuant to S. Res. 194, 89th Cong., 2d Sess. 25 (Committee Print 1966). The Interior Department's substitute bill provided that "[n]o Indian tribal government shall deny *to any member of the tribe* within its jurisdiction the equal protection of its laws." Hearings on S. 961, etc. (Constitutional Rights of the American Indian), before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 318 (1965) (emphasis added). Since the Fourteenth Amendment prohibits a state from denying equal protection of the laws "to any person within its jurisdiction," the coverage of that bill indeed would have been narrower than the coverage of the Amendment. The final version of the Indian Civil Rights Act, like the Fourteenth Amendment and unlike the substitute bill, guarantees equal protection of a tribe's laws "to any person within its jurisdiction."

[27] Senator Ervin, the chief sponsor of the Act, implied no such innovation when he stated during the Senate floor debate that its purpose was "to confer upon the American Indians the fundamental constitutional rights which belong by right to all Americans." 113 Cong. Rec. 33472 (1967).

[28] See, *e.g.*, the following language from the Senate Subcommitte's 1966 Summary Report, *supra* n. 26, at 9 referring to S. 961, 89th Cong., 1st Sess., the bill from which the Indian Civil Rights Act evolved:

though not exclusively in the area of criminal justice; but unlike the efforts to introduce white values to tribal Indians in the late nineteenth and early twentieth centuries, the Act's purpose was not to foster assimilation of the Indians but to assure responsible exercise of their tribal independence. Consistently with "[t]he overriding purpose of [the Indian Reorganization Act of 1934] * * * to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton* v. *Mancari*, 417 U.S. 535, 542, the Indian Civil Rights Act by its terms contemplates that Indian officials will administer tribal affairs and enforce tribal laws and that tribal courts will be the primary forum for adjustment of tribal disputes. While the Act significantly delimits tribal authority in some respects, it was designed to allow breathing space for traditional values that are at the heart of tribal culture and self-government.[29]

"The most serious objections to S. 961 took the form neither of objection to the purposes of the bill nor quarrel with the sundry allegations of the practice o[r] possibility of denial of rights by tribal governments. Instead, as numerous witnesses pointed out, the peculiarities of the Indian's economic and social condition, his customs, his beliefs, and his attitudes, raised serious questions about the desirability of imposing upon Indian cultures the legal forms and procedures to which other Americans had become long accustomed."

[29] See Note, *supra* n. 10, 82 Harv. L. Rev. at 1368; Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557, 617 (1972); Note, *Equal Protection under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo*, 90 Harv. L. Rev. 627, 631–632 (1977). Thus, Congress was selective in deciding which constitutional rights were to be guaranteed to American

The special character of Indian society has been recognized and respected by this Court on numerous occasions. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations * * *.'" *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. Although federal legislation may treat tribal Indians differently from non-Indians, "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *United States* v. *Antelope*, 430 U.S. 641, 646. Because of this "unique status," federal legislation affecting the interests of tribal Indians is not judged by the stricter scrutiny given to racial classifications (see p. 28, *supra*), but is upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Indians vis-a-vis their tribal governments. The earlier bill, S. 961, provided that "any Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." This approach was rejected in favor of the specification of particular guarantees because of concern that the Fifteenth Amendment's guarantee of equality of voting rights and the First Amendment's Establishment Clause would conflict with tribal blood-quantum requirements for membership and voting and would endanger the continued existence of Pueblo theocracies. See, *e.g.*, 1965 Hearings *supra* n. 26, 65, 221.

Morton v. *Mancari*, *supra*, 417 U.S. at 555. That unique status should also be a relevant factor in assessing tribal legislation under the equal protection clause of the Indian Civil Rights Act.[30]

In the variable balancing process familiar to equal protection analysis, special Indian interests might be protected under the Act by at least two different approaches. The standard of review might be adjusted to accord greater deference to tribal actions than is accorded to legislative judgments under the Fourteenth Amendment—so that all tribal actions were reviewed by the "rational basis" test, for instance, even when they impinged on fundamental rights or created suspect classifications. Alternatively, special weight might be given to Indian values in determining whether a particular tribal action meets the established equal protection standard that is applicable—whether the action rationally promotes a legitimate tribal objective, or is substantially related to an important objective, or survives the stricter scrutiny required when fundamental rights are affected or suspect classifications created. The latter approach seems preferable to us in reconciling the important individual and tribal values reflected in the Indian Civil Rights Act. The established Fourteenth Amendment standards are sufficiently flexible to accommodate in their application the special interests

[30] For example, the Act should not preclude the Pueblo from denying membership to persons whose parents were not Pueblo members, or to persons with less than a specified proportion of tribal ancestry. See *Morton* v. *Mancari*, *supra*.

of Indian tradition and culture that need consideration under the Act. And a further proliferation, or subdividing, of equal protection standards seems better avoided if possible. Cf. *Craig* v. *Boren, supra,* 429 U.S. at 219–211, n.* (concurring opinion of Justice Powell).[31]

At the least, therefore, when tribal legislation imposes different treatment on persons or classes of persons, the classification must bear a rational relationship to the achievement of a legitimate tribal purpose.

[31] Another possible approach, a variant of the first, would involve holding temporally constant the equal protection standards that are applicable under the Act, declining to update them to keep step with evolving notions of equal protection in non-Indian society when those new notions have no counterpart in Indian culture. Thus, if the changed conceptions of women's role in society that underlie this Court's recent willingness to scrutinize more closely discriminations based on sex, see *Craig* v. *Boren*, *supra*, 429 U.S. at 198–199, have no parallel in tribal Indian society, it might be argued that the tolerant standard of review formerly applied to sex discrimination under the Fourteenth Amendment should still be applied to tribal legislation under the Act. Such an approach, however, would present difficult problems of determining whether there has in fact been any parallel development within tribal society and, if not, of dating and identifying the older constitutional standard to be applied. Like the first approach, it would lead to an unwieldy proliferation of equal protection standards, with the added complication of differences over time. To the extent that the role of women in tribal society today is different from what it is in non-Indian society, we think such differences are better taken into account under the second approach—as special aspects of Indian culture or tradition to be given weight in applying the same equal protection standards that presently prevail in non-Indian cases. Such an approach can give due recognition to the reality that changing attitudes in non-Indian society may not be reflected in the cultural and social values of tribal society, and indeed may be at war with those values.

Further, when a distinction drawn by tribal action impinges on fundamental individual rights, creates a suspect classification, or otherwise would attract close scrutiny under established equal protection analysis, we believe the tribe must show that tribal interests justify the discrimination under the accepted standard.[32] The Pueblo ordinance in the present case discriminates on the basis of gender. Under prevailing equal protection standards, such a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren, supra,* 429 U.S. at 197. We believe the tribe bears the burden of showing that the ordinance meets at least this test.[33] We further believe the Santa Clara Pueblo has not made such a showing.

C. The Pueblo ordinance discriminates strictly on the basis of sex, penalizing both Julia Martinez and her children because Julia Martinez is a woman

[32] The justifying interests might be ones that would in other contexts be offensive to the Fourteenth Amendment, such as preservation of blood lines or tribal religions. See n. 29, *supra*.

[33] Since the ordinance deprives the children of Julia Martinez of the political rights that come with membership in the Pueblo (Pet. App. 17a), it may demand closer scrutiny as a discrimination that impinges on fundamental rights. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330, 336–337. We consider it unnecessary to reach this issue, however, since in our view the sex discrimination embodied in the ordinance is impermissible under the standard of *Craig* v. *Boren*.

The gender discrimination is not ameliorated, in its application to the children of Julia Martinez, by the fact that it turns not on their sex but on the sex of their parent. Cf., *e.g.*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172–176, dealing with classifications based on illegitimacy.

rather than a man. As a female Pueblo member who has married outside the tribe, Julia Martinez is not entitled—while a male Pueblo member is entitled—to pass to her children her house and her land use rights and the right to be a member of the tribe.[34] The children of Julia Martinez are denied membership in the Pueblo because they are the children of a Santa Claran woman who entered into a mixed marriage, while the children of a Santa Claran man who entered into such a marriage are granted membership by the ordinance. The result of the ordinance thus is not only a "mandatory preference to members of either sex over members of the other," *Reed* v. *Reed,* 404 U.S. 71, 76, but an absolute disqualification of women for rights granted to men. Such a discrimination is, at the least, "subject to scrutiny under the Equal Protection Clause," *Reed* v. *Reed, supra,* 404 U.S. at 75; "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren,* 429 U.S. 190, 197; see *Reed* v. *Reed,* 404 U.S. 71; *Stanton* v. *Stanton,* 421 U.S. 7; *Weinberger* v. *Wiesenfeld,* 420 U.S. 636; *Frontiero* v. *Richardson,* 411 U.S. 677.

[34] Thus the ordinance also discriminates against Pueblo women by impinging on their choice of a marriage partner, penalizing them (but not Pueblo men) for marrying outside the tribe. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639–640. *Cf. Loving* v. *Virginia,* 388 U.S. 1, 12; *Moore* v. *City of East Cleveland, Ohio,* No. 75–6289, decided May 31, 1977, slip op. 4–11 (plurality opinion).

Moreover, the ordinance works a significant hardship on Julia Martinez and her children. Denial of Pueblo membership means that the children are denied the right to vote and other political rights in the tribe;[35] they are denied the material benefits of Pueblo membership, including succession to the land use rights held by their mother; and unless another relative takes them in, they will not be entitled (although they may be allowed) to continue living at the Pueblo after their mother dies (Pet. App. 17a–18a). Their association with the Pueblo, at which they have lived all their lives, is therefore placed in continuing jeopardy.[36]

Petitioners contend that the ordinance is necessary to preserve the Pueblo's culture, both by preventing an influx of population lacking that culture as Pueblo members and by preserving the role of Pueblo men in carrying on the culture (Br. 28–29). They cite the testimony of Paul Tafoya, Governor of the Pueblo at the time of the trial, and of Dr. Florence Hawley Ellis, an anthropologist, to the effect that the Pueblo culture would eventually be destroyed if the ordinance was not enforced (*ibid.;* Tr. 116–117, 251). If this testimony is correct, the ordinance would be substantially related to the achievement of an important tribal objective and therefore might well be consistent with the equal protection clause of the Act, its discriminatory impact on respondents notwithstanding.

[35] See p. 7, *supra.*

[36] Cf. *Moore* v. *City of East Cleveland, Ohio,* No. 75–6289, decided May 31, 1977, slip op. 4–11 (plurality opinion).

In our view, however, the court of appeals correctly discounted this testimony.

The classification mandated by the ordinance does not bear a substantial relationship, or even a rational one, to the preservation of the Pueblo's culture. The ordinance excludes from membership full-blooded Indians like the Martinez children who live at the Pueblo and participate in its culture, religion, and daily life, while bestowing membership on persons who may never see the Pueblo in their lifetimes.[37] As the court of appeals observed (Pet. App. 43a):

> The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran. Compare this with the rights that are accorded the male member of the Santa Clara Pueblo. Even if he marries outside the Pueblo one who is not an Indian, and even though his family resides outside the territory of the Tribe, the offspring are entitled to tribal membership. The Tribe has not shown how such an incongruous and unreasonable result fosters and promotes cultural survival.[38]

[37] Approximately 150 members reside off the Pueblo, "one-third of them in other locations in New Mexico, and the rest scattered across twenty-two different states" (Pet. App. 14a).

[38] See Note, *supra* n. 10, 82 Harv. L. Rev. at 1362.

Insofar as the ordinance is defended on the basis of the need to limit the tribe's population, particularly with respect to the sudden increase in mixed marriages in the 1930's (Pet. App. 20a, 44a), the court of appeals correctly recognized (*id.* at 44a) that the Pueblo could have solved this economic problem without resort to discrimination. It could have continued its practice of determining the membership status of children of mixed marriages on an individual basis (*id.* at 29a–30a), or it could have excluded the children of all mixed marriages from membership, or it could have adopted a residence test or some comparable non-discriminatory criterion for identifying those children of mixed marriages who deserved membership. Any of these approaches would have dealt with the population problem while providing at least as much regard as the ordinance provides for the cultural affinity of any children of such marriages who were granted membership in the Pueblo. Any of these approaches would have avoided resorting, as the ordinance resorts, to discrimination based solely on sex and not on the culture, the attitude, the residence, or any other relevant attribute of the persons admitted to membership. If an advantage of "administrative ease and convenience" can still be claimed for the approach to the population problem taken by the ordinance, there is no reason why that objective should be any more valid in justifying sex discrimination by an Indian tribe than it has been held to be when asserted on behalf of a non-Indian government. *Craig* v. *Boren*, *supra*, 429 U.S. at 198.

Nor is the ordinance justified by the traditional "importance of men" (Pet. Br. 28 (testimony of Dr. Ellis)) in training children in the Pueblo culture. Although such "role-typing" has been rejected in equal protection analysis under the Fourteenth Amendment (*Stanton* v. *Stanton*, 421 U.S. 7, 15), we recognize that it is the kind of cultural value that might nonetheless justify sex discrimination under the Act if it were shown to be an authentic tribal tradition whose preservation substantially depended on the discriminatory enactment. Here, however, there is no such showing. As the court of appeals found, "historically the 1939 ordinance cannot be said to represent the Santa Clara tradition" (Pet. App. 44a). Before the ordinance was adopted, the membership status of children of mixed marriages was determined by the tribe on a case-by-case basis (*id.* at 21a, 29a–30a), and in several instances membership was granted to children of such marriages in which the mother was the member of the Pueblo (*id.* at 30a).[39] The role of men in teaching children the Pueblo tradition has not been limited to their own children; with respect to illegitimate children born of Pueblo women, the role has traditionally been fulfilled by having male relatives help the mother in-

[39] The Constitution adopted by the Pueblo in 1935 contained no discrimination such as the ordinance instituted four years later; rather, it stated that membership in the Pueblo would include "[a]ll children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council" (Article II, Section 1(c), A. 2). See n. 3, *supra*.

struct her children in the Pueblo's customs (Tr. 145). The Martinez family itself is compelling evidence that children can assimilate Pueblo culture without the benefit of a Santa Claran father."[40]

d. Finally, petitioners contend that "the absolute discretion of an Indian tribe to determine the requirements for enrollment in the tribe is as broad as that of the United States to determine the requirements for citizenship" (Br. 30). They rely on *Fiallo* v. *Bell*, 430 U.S. 787, in which this Court stated that immigration legislation involves "policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress" (slip op. 11).

For two reasons, the analogy is inapposite. Indian tribes, though quasi-sovereign nations, are subject to the plenary authority of Congress. And Congress, as we have noted (pp. 24, 30–32, *supra*), in passing the Indian Civil Rights Act decided to subject tribal membership decisions to equal protection requirements. Second, *Fiallo* was an immigration case, dealing with

[40] Compare Note, *Equal Protection under the Indian Civil Rights Act: Martinez* v. *Santa Clara Pueblo*, 90 Harv. L. Rev. 627 (1977). The conclusion that the Santa Clara ordinance violates the statutory equal protection clause does not mean that all tribal laws having membership provisions based on the father's or mother's blood line necessarily do so. As indicated in our memorandum filed at the petition stage (p. 9, n. 9), Department of the Interior records indicate that at least thirteen other Indian tribes have such membership requirements. Whether the rules of those tribes violate the Act will depend on the particular circumstances in each case.

the relationship between the United States and conceded aliens. The relationship between the Pueblo and the Martinez children is markedly different. The Martinez children were born of a Pueblo mother, residing on the reservation, and have lived at the Pueblo virtually all their lives. They are therefore more comparable to "persons born * * * in the United States," who are citizens at birth under the terms of the Fourteenth Amendment.[41]

[41] The Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

With respect to children born *outside* the United States to parents of whom one is a citizen and one is not, the United States until 1934 made a distinction similar to that of the Pueblo ordinance, granting citizenship if the father was the citizen but not if the mother was. See *Montana* v. *Kennedy*, 366 U.S. 308. Such a law would presumably be invalid under the Fifth Amendment today. See *Craig* v. *Boren*, 429 U.S. 190; *Reed* v. *Reed*, 404 U.S. 71; *Schneider* v. *Rusk*, 377 U.S. 163. Since 1934, the United States has maintained a residence requirement as a condition to the citizenship of children born abroad of such marriages. See *Rogers* v. *Bellei*, 401 U.S. 815.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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